MALAYSIAN REPORTS

MACON ENGINEERS SDN. BHD. v. GOH HOOI YIN

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) March 16, 1976]

[Penang — Federal Court Civil Appeal No. 30 of 1975]

Land Law — Caveat — Whether person who has entered into agreement to purchase land has a right to enter private caveat — Priority — Conflicting equities — National Land Code, ss. 322, 323(1), 324, 325, 326 and 327.

The respondent had agreed to purchase certain property from the vendors for the sum of $175,000 and had paid a deposit of $17,500 towards the purchase price. The date of completion was November 6, 1973. On November 6, 1973 the vendor's solicitor gave notice to the respondent's solicitors that the balance of the purchase price was to be paid by that day and that if the money was not paid the deposit would be forfeited. On November 23, 1973 the respondent's solicitors wrote to the vendor's solicitors pointing out that the vendors were not the registered proprietors of the property and stating that they were prepared to complete the purchase if the vendors were the registered proprietors, failing which he would rescind the contract and sue for damages. On November 27, 1973 the vendor's solicitors wrote to the purchaser's solicitors to state that no question of rescission of the agreement could arise as the agreement had been determined and the deposit forfeited. The respondent attempted to register a caveat to protect his right and interest in the agreement but did not succeed in doing so till November 21, 1974. On June 25, 1974 he issued a writ of summons against the vendors claiming specific performance of the agreement and damages. The appellants entered into an agreement to purchase the property from the vendors for a sum of $195,000 on June 15, 1974 and on full payment of the purchase price the vendors had executed a legal transfer of the property in their favour. The transfer could not however be registered because of the respondent's caveat. The appellants applied for the removal of their caveat and their application having been dismissed in the High Court they appealed to the Federal Court.

Held, dismissing the appeal; (1) it would seem abundantly clear from the authorities that so long as there is in existence a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement;

(2) the learned judge was therefore right in holding that the plaintiff had a right to enter a caveat against the said property and that the caveat was rightly registered;

(3) *prima facie* the respondent's caveat is earlier in time to the right of the appellants. It would therefore not be right for the caveat to be removed pending the result of the respondent's action.

Cases referred to:-

(1) *Chin Cheng Hong* v. *Hameed & Ors.* [1954] M.L.J. 169.

(2) *Temenggong Securities Limited & Anor.* v. *Registrar of Titles, Johore & Ors.* [1974] 2 M.L.J. 45.

(3) *Butler* v. *Fairclough* (1917) 23 C.L.R. 78, 79.

(4) *Abigail* v. *Lapin* [1934] A.C. 491.

(5) *In re Registration of Caveat* (1908) Innes 114.

(6) *Tee Chin Yong* v. *Ernest Jeff* [1963] M.L.J. 118.

(7) *Sellamah d/o Marimuthu* v. *Registrar of Titles, Perak* Perak Civil Appeal No. 16 of 1959 (unreported).

(8) *Official Assignee* v. *Madam Chan Kam Lin,* Selangor Originating Summons No. 140 of 1954 (unreported).

(9) *Bachan Singh* v. *Mahinder Kaur* [1956] M.L.J. 97.

(10) *Lysaght* v. *Edwards* [1876] 2 Ch. D. 499.

(11) *Haji Abdul Rahman & Anor.* v. *Mahomed Hassan* [1917] A.C. 209; I.F.M.S.L.R. 290, P.C.

(12) *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh* [1970] 1 M.L.J. 145.

(13) *Jit Kaur* v. *Parl Singh* [1974] 2 M.L.J. 199 at p. 201.

FEDERAL COURT.

Raja Abdul Aziz (*Goh Eng Kee* with him) for the appellants.

Lee Kok Liang for the respondents.

Gill C.J. (Malaya): This is an appeal from the decision of Arulanandom J. dismissing the appellants' application for an order to set aside a private caveat entered at the instance of the respondent on the register document of title to land comprised in holding No. 456, Town Subdivision 20, North East District, Penang with a building thereon known as premises No. 53 King Street Penang (hereinafter called "the property").

The caveat was lodged by the respondent pursuant to an agreement in writing dated July 9, 1973 whereby he had agreed to purchase the said property from Weng Lye Development Sendirian Berhad (hereinafter called "the Vendors") for a sum of $175,000 and paid a deposit of $17,500 towards the purchase price. He was to pay the balance of the purchase price on or before November 6, 1973, whereupon the vendors were to execute in his favour a valid and registrable transfer of the said land in National Land Code Form 14A. In the event of his failure to pay the balance purchase price within the stipulated time, the vendors were to be at liberty to determine the agreement and forfeit the deposit. It was stated in the recital in the agreement that the vendors were the registered proprietors of the said property.

On November, 6, 1973 the vendors' solicitors wrote to the respondent's solicitors to give notice that the balance purchase price was to be paid by that day, and to say that unless they received the money immediately the deposit would be forfeited in accordance with clause 7 of the sale agreement. On November 23, 1973 the respondent's solicitors wrote to the vendors' solicitors pointing out that, contrary to the recital in the agreement, on the date of the agreement and even on that date the vendors were not the registered proprietors of the said property. The letter went on to state, however, that the purchaser was prepared to complete the purchase within two days if the vendors were the registered owners of the property, failing which he would rescind the contract and sue for the recovery of the deposit and damages. On November 27, 1973 the vendors' solicitors wrote to the purchaser's solicitors to state, *inter alia,* that no question of recission of the agreement by the purchaser could arise as the agreement had been determined on his failure to comply with the provision of clause 3 of the agreement and the deposit forfeited.

In December 1973 the respondent attempted to register a caveat to protect his right and interest under the agreement, but he did not succeed in doing so until November 21, 1974. On June 25, 1974 he issued a writ of summons against the vendors claiming specific performance of the agreement and damages for breach of contract in *lieu* of or in addition to specific performance.

The application by the appellants for the removal of the caveat lodged by the respondent was made on the grounds that they had agreed to purchase the said property from the vendors for a sum of $195,000 by

an agreement dated June 15, 1974, and that on full payment by them of the agreed purchase price the vendors had executed in their favour a legal transfer of the said property which could not be registered because of the respondent's caveat.

At the hearing of the application before the learned judge the main argument by counsel for the appellants was that, as the respondent had acquired no registrable interest in the land under his sale agreement, his caveat should not have been registered under section 323(1) of the National Land Code. For this argument he relied on the case of *Chin Cheng Hong* v. *Hameed & Ors.*[1] in which it was held that an agreement only passes a contractual interest and not a registrable interest. It was further argued on behalf of the appellants that as they were *bona fide* purchasers without notice of the respondent's rights, the respondent's contractual rights under the sale agreement could not override their registrable interest under the transfer.

The learned judge rejected all those arguments on behalf of the appellants and held that the plaintiff had a right to enter a caveat against the said property and that the caveat was rightly registered. In reaching that conclusion he found support in the following passage at page 327 of the Torrens System in Malaya by S. K. Das:

"The provision for lodging a caveat is for the very purpose of enabling parties to protect interests which, owing to a defect in the instrument or want of form or otherwise, they cannot protect by the ordinary process of registration. A caveat is a temporary impediment to registration of dealing and is not necessarily a blot on the title. The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not become actual interests in land. The caveator's claim is neither increased nor diminished by the lodgment of caveat. It is a remedy ancillary to such other proceedings as may be proper for disposing of the question in dispute."

The appellants next relied on the case of *Temenggong Securities Limited & Anor.* v. *Registrar of Titles, Johore & Ors.*[2] for the proposition that as the appellants had paid the full purchase price and obtained a valid transfer the caveat of the respondent should be removed. The learned judge, however, held that the decision in that case was inapplicable to the facts of the present case, the caveat in that case having been lodged pursuant to section 320(1)(b) of the National Land Code by the Registrar of Titles to protect the interest of the Government on the mere assertion of a contingent claim to a debt, so that the caveat was wrongly entered and held by the court to be of no effect.

Dealing next with the question of priorities, the learned judge held that the respondent had a prior equity to that of the appellants by reason of his agreement with the common vendors being very much earlier in time and by reason of the fact that he had lodged his caveat before the appellants presented their transfer for registration and had in fact sued the common vendors for specific performance of his agreement. For reaching that conclusion the learned judge found support in the following passages at pages 305 and 314 respectively in *S. K. Das* on the Torrens System in Malaya:

"A person dealing with a proprietor is entitled to assume that there are no prior inconsistent dispositions of the land which do not appear on the face of the register. But neither his ignorance of a prior informal disposition by the proprietor nor his *bona fide* in entering into the transaction and parting with money in good faith is sufficient to defeat a claim under an earlier equity."

"A caveat lodged by the owner of a prior equity enures to his benefit to defeat the claim of a later equitable right acquired *bona fide* on the strength of a clear title on the register before such caveat is lodged."

In the result, the learned judge decided that the caveat must remain to protect the interest of the respondent until the suit filed by him against the registered proprietors was finally disposed of. Accordingly, he dismissed the appellants' application with costs.

At the hearing before us, learned counsel for the appellants, Raja Abdul Aziz, submitted that there were only two questions to be decided in this appeal. The first question is whether the respondent was qualified to enter the private caveat within the terms of section 323 of the National Land Code. If the answer to that question is in the negative, then the caveat must be removed. If the answer is in the affirmative, then the second question which arises is whether the subsequent interest of the appellants overrides the earlier right of the respondent.

As regards the first question, section 323(1)(a) of the National Land Code provides that a private caveat may be entered at the instance of "any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest." It would seem clear that the respondent cannot claim title to or any registrable interest in the property in question merely on the strength of the sale agreement which is a non-statutory and non-registrable instrument, but it cannot be denied that he has a right under that agreement to such title or interest by bringing an action for specific performance of the agreement, which in fact he has already done.

In Butler v. *Fairclough*[3] Griffiths C.J. said:

"It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognize equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings."

The above statement of the law was approved by the Privy Council in *Abigail* v. *Lapin*[4] in which Lord Wright delivering the judgment of their Lordships said (at page 500) that a caveat may be lodged with the registrar by any person claiming under any unregistered instrument. In *Chin Cheng Hong* v. *Hameed & Ors.*[1] Buhagiar J. said at page 170:

"The whole system of caveats is founded on the principle that they exist for the protection of alleged as well as proved interests and of interests that have not yet become actual interests in land, but a caveat, being in the nature of a statutory injunction, does not in itself make a claim or right either better or worse."

In the light of those decisions I am of the opinion that the answer to the first question cannot but be in the affirmative.

It would seem abundantly clear from the authorities that, so long as there is in existence a valid

agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement. It was contended for the appellants that, as the respondent failed to pay the balance of the purchase price when asked to do so, and as he elected to sue for damages, he lost any equity that he might have had. It was further contended that the purchaser had no right to question the title of the vendors.

I do not think it would be correct to say that the respondent questioned the title of the vendors. What he wanted the vendors to do was to show that they were the registered proprietors of the property in question and that they were in a position to give him a valid and registrable transfer on payment of the purchase price. Nor do I think that it would be correct to say that he elected to sue for damages. The fact that he proceeded to take steps to lodge a caveat as early as December 1973 would seem to show that he wished to enforce the sale agreement. It was indeed for the purpose of protecting his right under the sale agreement temporarily in anticipation of legal proceedings that he lodged his caveat. The effect of the caveat is that no instrument effecting the land can be registered while it is in force. The entry of the caveat does not make his claim or right either better or worse, and it is not for us at this stage to say whether he will succeed in his claim for specific performance. It may well be that he will get only damages instead. But pending the result of the action which he has filed he is entitled to have the caveat remain in force.

Coming now to the second question as to whether the subsequent interest of the appellants overrides the earlier right of the respondent, the basic rule at law, as in equity, is that estates and interests primarily rank in the order of creation. *Qui prior est tempore potior est jure:* he who is earlier in time is stronger in law. (See Snell's Principles of Equity 27th Edn. page 45). Where there is a system of registration of titles to land the one who succeeds in the scramble to get on the register emerges victorious. In the present case the respondent did get on to the register earlier. I do not think it is open to us at this stage to decide on the conflicting equities of the two parties. That again is a matter which will have to be decided by the court when the respondent's action comes up for trial. *Prima facie,* the respondent's equity is earlier in time to that of the appellants. It will therefore not be right for the caveat to be removed pending the result of the respondent's action.

For the reasons I have stated I would dismiss the appeal with costs.

Ali F.J.: This is an appeal against the dismissal of an application by the appellants for an order to set aside or remove a private caveat which was entered by the respondent and registered in the Land Office, Penang on November 21, 1974 as Jilid No. 10, Folio No. 107.

The caveat was registered under the provisions of section 323 of the National Land Code (hereinafter referred to as the Code) on the application of the respondent in Form 19B stating that he was a purchaser of the land under an agreement with the owner, Weng Lye Development Company, and that he had paid 10% of the purchase price as deposit and part payment.

It would appear from the affidavit filed by the appellants that the respondent did not pay the balance of the purchase price on the date fixed by the agreement and according to the affidavit of the Company's managing director, Yap Song Weng, the agreement has been terminated by the Company.

Be that as it may the respondent seems to be disputing the Company's right to terminate the agreement and has in fact filed an action against the Company claiming specific performance of the agreement. The writ in the action was issued on June 25, 1974 and the action, listed as Penang Civil Suit No. 212 of 1974, is still pending for trial.

On October 25, 1974, that is to say before the caveat was entered, the Company sold the land to the appellants under another agreement for sale and executed a Memorandum of Transfer, a copy of which is attached to the appellants' affidavit. The Memorandum was not and has not yet been presented for registration. On the assumption that registration would be refused the appellants applied to the High Court for an order to remove the caveat. The application was dismissed and the appellants have now appealed to this court.

A caveat is a creature of statute and is in the nature of a statutory injunction which in terms of section 322(2)(a) of the National Land Code has the effect of prohibiting the registration, endorsement or entry of any instrument of dealing executed by or on behalf of the proprietor. By entering a caveat a person protects his right to land or right to an interest in land. Under section 323(1)(a) of the Code a private caveat may be entered at the instance of a person (1) claiming title to any alienated land, or (2) claiming any registrable interest in such land, or (3) claiming any right to such title or interest. Any such person who applies to enter a caveat is required by subsection (2) of the same section to apply in the prescribed form 19B in which he must specify the nature of the claim on which the application is based and whether the caveat is to be expressed to bind the land itself or a particular interest only. Subsection (3) further requires the application to be accompanied by the prescribed fee and so far as it sets out the claim giving rise thereto be verified by a statutory declaration by the applicant or by his advocate and solicitor.

Section 324(1) of the Code requires the Registrar on receiving such application to enter the caveat as soon as possible without having to enquire into the validity of the applicant's claim. So much about entering a caveat.

A caveat having been entered can be withdrawn or removed. It may be withdrawn by the caveator himself under section 325 of the Code; or it may be cancelled under section 326 on the application of the person whose land or interest in land is bound by the caveat. It would seem to me that under section

326 only the registered owner can apply to remove the caveat which on a month's notice is removed unless the court otherwise orders.

The appellants in the instant case not being registered owners of the land could only apply under section 327 of the Code as persons aggrieved by the existence of the caveat. On the facts before him the learned judge seemed to have no doubt that they were aggrieved persons. But what was more important is whether the caveat should be removed. Section 327 says that the court may make an order on the application as it may think just. In other words it may grant or refuse the application. In my view the court may grant the application if it is shown that the caveat was entered wrongfully or without reasonable cause. In the context of section 102 of the Evidence Act, 1950 I have no doubt that the burden of showing that the caveat was entered wrongfully or without reasonable cause is on the appellants. In this case the High Court in dismissing the application must be assumed to have found that the appellants failed to discharge the burden. The case for the appellants as argued here and in the court below is as set out in some of the grounds of appeal which are as follows:

In ground (1) the argument was that the respondent had only contractual rights under the 1973 agreement which being non-statutory and non-registrable did not entitle him to enter the caveat. For this view the appellants have relied on the decision of the Court of Appeal in *Chin Cheng Hong* v. *Hameed & Ors.*[1] which, in my opinion, contains no such proposition. The case was concerned mainly with a claim for specific performance by a purchaser of land under an agreement for sale. On the facts it was held that the purchaser's contractual right under the agreement could not override the registrable interest of the partners in a partnership to whom the land belonged. Except for Buhagiar J. the other two judges did not consider the question whether the purchaser's right under the contract could support a caveat. Buhagiar J. on page 170 of the report said this —

"... This contractual right may be sufficient to give a person an 'interest' in the land for the purposes of protection by restrictive entry in the register; the claim to an interest in land arising out of the contract is sufficient to make it a caveatable interest and to support a caveat *(In re Registration of Caveat)*."[5]

In *Tee Chin Yong* v. *Ernest Jeff*[6] Ismail Khan J. (as he then was) referred to this saying that it was *obiter*. He pointed out, however, that Smith J. had adopted the same view in *Sellamah d/o Marimuthu* v. *Registrar of Titles, Perak*[7] (Perak Civil Appeal No. 16 of 1959) which is unreported. Wilson J. took a different view in *Official Assignee* v. *Madam Chan Kam Lin*[8] (Selangor Originating Summons No. 140 of 1954), also unreported, although he was one of the judges in *Chin Cheng Hong* v. *Hameed & Ors.*[1] According to Wilson J. a purchaser under an agreement has no registrable interest in the land and, therefore, is not entitled to file a caveat. Section 166 of the old Land Code which had to be considered in all the cases mentioned above was in the following terms:

"The grantor of any instrument of trust or a beneficiary or a guardian or next friend of any minor beneficiary or a trustee or *any person claiming title to or registrable interest in land* may present a caveat to the effect that such land shall not be transferred, charged or leased by the proprietor either:
(a) absolutely, or
(b) except in such manner and to such extent as to such caveat may be expressed, or
(c) until notice shall have been served on the caveator, or
(d) unless the transfer, charge, or lease be expressed to be subject to the claim of the caveator as expressed in such caveat, or
(e) except subject to any conditions expressed in such caveat."

(The italics are mine)

So far as the words "any person claiming title to or any registrable interest in land" are also used in section 323(1)(a) of the National Land Code it is a matter for consideration whether the view taken by Buhagiar J. in *Chin Cheng Hong* v. *Hameed & Ors.*[1] or that taken by Wilson J. in the other case is a correct statement of the law. Speaking for myself I incline to the view taken by Buhagiar J. for the following reasons.

A purchaser of land under an agreement cannot obviously have any registrable interest in land. But he has a right to the land or interest in land against the vendor personally which according to Thomson J. (as he then was) in *Bachan Singh* v. *Mahinder Kaur*[9] is not good against the world as a whole. It will be good against the world as a whole if the vendor executes a legal transfer, that is to say, a transfer executed in the manner required by section 215 of the National Land Code and the transfer is registered in the land office. This is because on the registration of the transfer the purchaser becomes vested with the real legal right to or interest in land. In the case of a vendor who refuses to execute such a transfer the purchaser will have to sue him for specific performance which, if granted, would result in the vendor being compelled by the court to execute the transfer. While waiting for specific performance the purchaser must be able to do something to prevent the vendor from disposing of the land to another buyer or purchaser. He may ask the court for an injunction or he may avail himself of the protection given by the National Land Code. The latter, I think, is comparatively an easier way of protecting his right or interest. If he enters a caveat that is enough evidence to show that he is "claiming a registrable interest in land." Thus stated ground (1) of the Memorandum of Appeal must therefore fail.

In grounds (5) and (6) the appellants are saying that the 1973 agreement having been terminated by Weng Lye Development Company the respondent is not entitled to claim specific performance. Differently put this means that the respondent's caveat was entered without reasonable cause within the meaning of section 329 of the Code. Whether or not the agreement has been rightly terminated is clearly an issue between the respondent as purchaser and Weng Lye Development Company as vendors under the agreement. The appellants not being parties to the agreement are clearly not in a position to know the true circumstances in which the dispute arose between the Company and the respondent. The fact that the Managing Director of the Company had sworn an affidavit saying that the agreement has been terminated cannot be a ground for holding that the respondent is not entitled to claim specific performance. For the reasons stated I would reject grounds (5) and (6).

Grounds (4) and (7) can be considered together. Here the appellants are contending that on November 21, 1974 when the caveat was entered there was no interest over which a valid caveat could be lodged. This is founded on the view that the vendors, Weng Lye Development Company, having executed the Memorandum of Transfer on October 25, 1974 parted with the land or with their interest in the land. The same view was apparently taken by the Federal Court in *Temenggong Securities Ltd. & Anor.* v. *Registrar of Titles, Johor & Ors.*[2] On page 47 of the report Ong Hock Sim F.J., delivering the judgment of the court said:

> "We are of the view that the vendors, having parted with their interest in the lands to the appellants, are bare trustees and have no interest in the land over which a valid caveat can be lodged."

The learned Federal Judge had earlier referred to a passage from the judgment of Jessel M.R. in *Lysaght* v. *Edwards*[10] which reads thus:

> "... the effect of a contract for sale has been settled for more than two centuries; certainly it was completely settled before the time Lord Hardwicke, who speaks of the settled doctrine of the court as to it. What is that doctrine? It is that the moment you have a valid contract for sale the *vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser,* the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession."

(The italics are mine)

As I understand the above passage what passes under a contract for sale is only the beneficial ownership. In saying that the vendor becomes in equity a trustee Jessel M.R. must have meant that the vendor who still holds the interest in land does so hold as trustee and not as owner. This must be so as beneficial ownership does not carry with it any interest in land. Legal or registered ownership does carry with it an interest in land. Thus stated it is therefore clear that a vendor under a contract of sale does not part with his interest in land as contended by the appellants in grounds (4) and (7) or as stated by the learned Federal Judge in *Temenggong Securities Ltd. & Anor.* v. *Registrar of Titles, Johor & Ors.*[2] On this view of the matter the appellants' contention in grounds (4) and (7) must also fail.

I have no doubt whatsoever that at the time the respondent's caveat was entered Weng Lye Development Company had not parted with their interest in the land. To the extent that *Temenggong Securities Ltd. & Anor.* v. *Registrar of Titles, Johor & Ors.*[2] was dealing with a Registrar's caveat under section 320 of the Code and not with a private caveat under section 323 as in this case it is not an authority which can be relied upon by the appellants. The appellants may be reminded of what was said by the Privy Council in *Haji Abdul Rahman & Anor.* v. *Mahomed Hassan*[11] that we should not be too much swayed by the doctrines of English equity but to pay sufficient attention to the fact that in this country we are dealing with a totally different land law, namely a system of registration of titles contained in a codifying enactment.

Ground (2) is not by itself a ground of appeal. It is a complaint against the learned judge for saying that there was no evidence that the appellants had paid the full purchase price for the land. Even if there was evidence I fail to see how this can assist the appellants particularly when grounds (4) and (7) cannot support their appeal.

Finally, I come to ground (3) in which it is stated that the learned judge wrongly held that the principle of priority applies. The question of priority was raised in the court below by counsel for the respondent. Counsel for the appellants had submitted that it was not relevant but the learned judge, apparently agreeing with the former, has held that the respondent has a prior equity. That would mean that the respondent has the right to be registered as the owner of the land. Quite clearly the stage has not been reached when this can be pronounced by the court. Both the appellants and the respondent have to establish that they have equities or equitable rights in respect of the land under the respective agreements. Until the question of equities is determined I cannot see how the question of priority of equity can arise for consideration in the present proceedings. I therefore disagree with the finding that the respondent has a prior equity. This, however, is only of academic importance. It cannot have any effect on this appeal.

In all the circumstances of this case I would conclude that the appellants have not shown either on the facts or on the law that the respondent's caveat should be removed. In my opinion their application was rightly dismissed by the court.

I would therefore dismiss this appeal with costs.

Raja Azlan Shah F.J.: As I see it, the central question in this appeal is whether the private caveat should be removed. That presupposes a caveatable interest in favour of the respondent. In my view, the respondent had a contractual right under a contract of dealing in land which is a right of action against the vendor personally. That is a caveatable interest. There is statutory support for this view *vide* section 323(1)(a) of the National Land Code which appears wide enough to include any person claiming any right to title or interest in land. This section is enacted in wider terms as compared with the corresponding provisions of previous legislation — see section 166 of the Land Code, 1926

How can the respondent's caveatable interest be removed and what are the principles governing it? It is no longer in doubt that the entry of a caveat casts a dark shadow on the property. It paralyses the dealings in it. No one can buy the property under such a cloud. That is the reason for the appellants' application to remove the said caveat. If the caveat is entered when it ought not to be, the court can order its removal. The party aggrieved is entitled to compensation for wrongful entry of a private caveat (section 329). In some cases it would not be right to remove a caveat. For instance, if the caveator had a substantial point in his favour and it would not be right and proper to remove it. In that case it would not be appropriate to grant a relief under the summary provisions which are envisaged under section 327 of the National Land Code.

In my opinion what the court at the present stage has to see is not that the caveator must ultimately succeed, but that he has a *prima facie* case, and that his claim is not baseless or frivolous. In such circumstances the court will not summarily remove the caveat but will extend it until the hearing of the action. The burden of proof rests on the caveator as the person asserting the claim. In *Nanyang Development (1966) Sdn. Bhd.* v. *How Swee Poh*[12] (a non-unanimous decision) this court had occasion to say that it is for the caveator in an application under section 327 to satisfy the court that it is just for the caveat to remain. I think that decision is in accordance with principle and authority.

In the present case the respondent claims that he has an interest in the said land. He has filed a claim against the registered proprietors for specific performance, damages and lien over the said property. Whether he has good grounds for his alleged claim is surely worthy of argument and consideration. I cannot say that his claim is so baseless or frivolous that he should be deprived of his chance to have that tried in an action. And it would be a denial of that chance if the caveat were summarily removed, for once the appellants registered the transfer, the caveator's right, if he has any, is destroyed. I further take the view that a caveat based on a document which *prima facie* is valid will not be removed on a summary application where the facts are involved and seriously disputed. Similar premonitory hint is detectable in *S.K. Das* on the Torrens System in Malaya (pages 347-348) which was adopted in *Jit Kaur* v. *Parl Singh*[13]:

"In dealing with applications for the extension of the operation of or for the removal of caveats against dealings with land it has always been the desire of the court to allow the parties the fullest opportunity to litigate any matter that may be in dispute between them. The court is loth to prevent parties litigating any right that they think they may possess: *In re Caveat of Lewis* (1903) 23 N.Z.L.R. S.C. 581. Where there is a conflict of testimony the caveat will not be discharged."

For the above reasons I will dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Goh Eng Kee & Lim; Lee Kok Liang & Co.*

PUBLIC TEXTILES BERHAD v. LEMBAGA LETRIK NEGARA

[F.C. (Gill C.J. (Malaya), Ali and Raja Azlan Shah F.JJ.) March 16, 1976]

[Penang — Federal Court Civil Appeal No. 177 of 1974]

Evidence — Estoppel — Estoppel by negligence — Estoppel by representation — Contract to supply electricity to company — Company undercharged by mistake — Accounts rendered by National Electricity Board utilised by company for costing their products — Whether Board estopped from claiming amount — Act constituting Board founded on considerations of benefit of public in general — Doctrine of ultra vires — Evidence Act, 1950, s. 115.

Electricity — National Electricity Board undercharging customer — Whether estopped from claiming amount due if customer has acted on accounts to his detriment — Act constituting Board founded on considerations of benefit of public in general — Electricity Act, 1949.

The respondent Board had contracted to supply electricity to the appellants. By mistake it had considerably undercharged the appellants and they claimed the amount of $84,624.01 cents from the appellants. The High Court gave judgment in favour of the Board, the learned trial judge holding that the Board was not estopped from claiming the amount although the appellants had utilised the accounts rendered by the Board for the purpose of costing their products. The appellants appealed to the Federal Court.

Held, dismissing the appeal: (1) the cases of estoppel by negligence are associated with those cases in which the silence of one under a legal duty to speak or act is regarded as a representation and it is a breach of that duty which is relied upon as creating an estoppel. The doctrine of estoppel by negligence however has no application to the present case because there was an express representation by the servant or agent on behalf of the representor;

(2) the plea of estoppel by representation cannot be pleaded against a public corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public;

(3) such public corporation cannot indirectly do, by placing itself under the disability of estoppel, what it could not have directly done by reason of statutory prohibitions;

(4) the Electricity Act constituting the Board was founded not so much on considerations of trade as for the benefit of the public in general. The Board had a statutory duty to perform to assess the appellants for rates in accordance with the prescribed tariff for electricity actually supplied and the appellants had a corresponding duty to pay at the scheduled rates for electricity energy consumed. To waive the payment at scheduled rates is prohibited by the doctrine of *ultra vires*. If the plea of estoppel is allowed, the scheduled rates due in respect of the actual amount of electric energy supplied would be indirectly remitted, which the Board could not by any act directly remit. To allow the plea of estoppel would therefore be nullifying the statutory provisions of the Act.

Cases referred to:-

(1) *Maritime Electric Company Limited* v. *General Dairies* [1937] A.C. 610.

(2) *Taranaki Electric-Power Board* v. *Proprietors of Puketapa 3A Block Incorporated* [1958] N.Z.L.R. 297.

(3) *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1892) L.R. 19 Ind. App. 203.

(4) *Mercantile Bank of India Ltd.* v. *Central Bank of India Ltd.* [1938] 1 All E.R. 52.

(5) *Swan* v. *North British Australasian Co.* (1863) 2 H. & C. 175 Ex. Ch.

(6) *Greenwood* v. *Martin's Bank Ltd.* [1933] A.C. 51.

(7) *Greenwood* v. *Martin's Bank Ltd.* [1932] 1 K.B. 379, 380.

(8) *Freeman* v. *Cooke* (1848) 2 Ex. 654, 663.

(9) *Pickard* v. *Sears* (1837) 6 A. & E. 469, 474.

(10) *Gregg* v. *Wells* (1839) 10 A. & E. 90, 97.

(11) *Moorgate Mercantile Co. Ltd.* v. *Twitchings* [1975] 3 All E.R. 314.